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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE TESLA, INC. SECURITIES  
LITIGATION

Case No. 3:18-cv-04865-EMC

**PLAINTIFF'S NOTICE OF MOTION  
AND MOTION FOR PARTIAL  
SUMMARY JUDGMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

**ORAL ARGUMENT REQUESTED**

Date: March 10, 2022

Time: 1:30 p.m.

Location: Courtroom 5, 17<sup>th</sup> Floor

Judge: Hon. Edward Chen

**\*\*\*FILED UNDER SEAL\*\*\***

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1                   **NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT**

2                   PLEASE TAKE NOTICE that on March 10, 2022 at 1:30 p.m., or as soon thereafter as  
3 this matter may be heard, in Courtroom 5 – 17th Floor of the United States Courthouse located at  
4 450 Golden Gate Avenue, San Francisco, CA 94102, the Honorable Edward M. Chen presiding,  
5 Plaintiff Glen Littleton, by his counsel, will move, and hereby does move, to enter partial  
6 summary judgment in favor of Plaintiff and against Defendants Tesla, Inc., Elon Musk, Brad W.  
7 Buss, Robyn Denholm, Ira Ehrenpreis, Antonio J. Gracias, James Murdoch, Kimbal Musk, and  
8 Linda Johnson Rice (“Defendants”) pursuant to Federal Rule of Civil Procedure 56.

9                   PLEASE TAKE FURTHER NOTICE that Plaintiff seeks partial summary judgment  
10 against Defendants on the following elements of his alleged violations of Securities Exchange  
11 Act §10(b), 15 U.S.C. §78j(b), and SEC Rule 10b-5, 17 C.F.R. §240.10b-5: (1) material  
12 misrepresentations or omissions; (2) scienter; and (3) reliance upon the misrepresentations or  
13 omissions.

14                  PLEASE TAKE FURTHER NOTICE that this motion is based on the Memorandum of  
15 Points and Authorities below, the Declaration of Adam M. Apton and the exhibits attached  
16 thereto, the arguments of counsel, and any other matters properly before this Court. Pursuant to  
17 Paragraph 11 of the Court’s Civil Standing Order – General, Plaintiff also submits herewith a  
18 proposed order.

19                   **ISSUES TO BE DECIDED**

20                  1.       Should the Court grant partial summary judgment in Plaintiff’s favor against  
21 Defendants where the record indisputably shows that Elon Musk falsely represented with scienter  
22 “Funding secured,” “Investor support is confirmed,” and “Only reason why this is not certain is  
23 that it’s contingent on a shareholder vote” on August 7, 2018 and made materially misleading  
24 statements with scienter in his blog post on August 13, 2018?

25                  2.       Should the Court grant partial summary judgment in Plaintiff’s favor against  
26 Defendants on the element of “reliance” where the record indisputably shows that Plaintiff has  
27 established the presumption of reliance set forth in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)  
28

1 and this presumption has not, and cannot, be rebutted?

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **INTRODUCTION**

4 On August 7, 2018, at 9:48 a.m. PDT, Elon Musk (“Musk”), Chairman and Chief  
 5 Executive Officer of Tesla, Inc., shocked its investors and the public by announcing through his  
 6 Twitter account: “Am considering taking Tesla private at \$420. Funding secured.” No one  
 7 expected this announcement, including Tesla’s Board of Directors and its management who  
 8 instantly scrambled to respond to media and investor inquiries. Tesla’s stock price immediately  
 9 rocketed upwards leading to a temporary suspension of its trading by NASDAQ. Musk followed  
 10 up his earlier tweet by tweeting at 12:36 p.m. PDT: “Investor support is confirmed. Only reason  
 11 why this is not certain is that its contingent on a shareholder vote.” Tesla’s stock continued its  
 12 rise, closing on August 7, 2018 at \$379.57 per share, 6.36% higher than its price at 9:47 a.m. PDT  
 13 immediately before Musk’s tweets. As this Court noted in its opinion denying Defendants’ motion  
 14 to dismiss the complaint: “The statement could be read by a reasonable investor to mean complete  
 15 funding for the transaction was unconditionally secured” and “as something more than a  
 16 speculative amorphous opinion about future possibilities” but instead “implying a more concrete  
 17 state of affair.” *In re Tesla, Inc. Securities Litig.*, 477 F. Supp. 3d 903, 922-25 (N.D. Cal. 2020).

18 Musk’s tweets created a frenzy of media and investor attention on Tesla and his proposal.  
 19 In the following ten days, over 2400 articles were published concerning it. After providing a  
 20 further “update” on August 13, 2018 that continued to omit key information regarding the  
 21 proposed transaction’s structure, funding, and level of investor support, Musk sat for an interview  
 22 with the *New York Times*, published on August 16, 2018, which revealed that funding was not  
 23 secured, investor support was far from confirmed, and the basic feasibility of the transaction was  
 24 still uncertain. Tesla’s stock price plummeted and analysts quickly discounted completely the  
 25 likelihood of any going private transaction. On August 23, 2018, Musk informed Tesla’s Board  
 26 that he was no longer pursuing the transaction, just 16 days after his tweet that the only remaining  
 27 step to finalizing the transaction was a shareholder vote.

1 The evidence shows that Musk's August 7, 2018 tweets were false at the time they were  
 2 made. Specifically, the undisputed facts, based almost exclusively on testimony and documents  
 3 from Musk and other members of Tesla management are:

4 **1. Funding was not secured on August 7, 2018.** Musk had one 30-minute conversation  
 5 about potentially taking Tesla private with the Saudi Arabia Public Investment Fund ("Saudi  
 6 PIF") on July 31, 2018. No price was discussed, no structure for the transaction was proposed, no  
 7 amount of funding was agreed. There was no legally binding agreement and no recourse to Musk  
 8 or Tesla if the Saudi PIF backed out. The Saudi PIF representatives left the meeting expecting  
 9 further information about a potential transaction. Musk and Tesla never provided this additional  
 10 information and never intended to use the Saudi PIF to fund more than 25% of any going private  
 11 transaction. Following the tweet, Musk and his financial advisors spent two weeks developing a  
 12 plan to obtain funding from numerous sources. This plan would have been completely  
 13 unnecessary if funding was "secured" on August 7, 2018.

14 **2. Investor support was not confirmed by August 7, 2018.** Musk had not discussed  
 15 taking Tesla private at \$420 per share with any outside Tesla investor prior to his tweets on August  
 16 7, 2018. Under no circumstance could investor support have been confirmed when Musk had not  
 17 communicated even the potential of a going private transaction to outside investors, aside from  
 18 the Saudi PIF. Only after his tweet did Musk begin discussing the going private transaction with  
 19 investors and he discovered that most opposed rather than supported it.

20 **3. A shareholder vote was not the only contingency for the proposed transaction.**  
 21 Tesla going private would be one of the largest corporate transactions in American history. In  
 22 addition to a shareholder vote, it would require extensive deliberation by Tesla's Board,  
 23 independent legal and financial advice, negotiation of comprehensive legal documentation, and  
 24 extensive regulatory approval. By August 7, 2018, none of this had happened. Musk had merely  
 25 started discussions with Tesla's Board by email on August 2, 2018 and at a meeting held on  
 26 August 3, 2018 but the Board did not have a formal proposal to evaluate, let alone something that  
 27 could be presented for a shareholder vote. Neither Musk nor the Board had retained legal or  
 28

1 financial advisors and the proposed structure of any going private transaction was still  
2 undetermined.

3       These undisputed facts show that the statements made by Musk in his August 7, 2018  
4 tweets were false when made. The immediate market reaction as well as the intense media and  
5 investor scrutiny over the ensuing ten days, allows no dispute over their materiality. Finally, there  
6 is no dispute that Musk knew every fact that rendered his statements untrue: he was present at the  
7 July 31, 2018 conversation with the Saudi PIF and knew there was no funding secured; he knew  
8 he had not discussed taking Tesla private at \$420 per share with any outside Tesla investor and,  
9 accordingly, investor support could not possibly be confirmed; and he knew that Tesla going  
10 private was contingent on much more than a shareholder vote. Yet on August 7, 2018, he  
11 nevertheless made these tweets to his then over 22 million followers.

12       Musk has stated that the August 7, 2018 tweets were not misleading or fraudulent because  
13 he subjectively believed they accurately represented his thinking at the time they were made. But  
14 this subjective belief is legally insufficient to avoid liability under Rule 10b-5. If Musk's  
15 subjective belief were sufficient, there could be never be liability for making a false statement  
16 absent a complete confession of guilt. The law imposes an objective standard for assessing falsity  
17 and holds defendants liable when they know the facts that render their statements objectively  
18 false. Objectively, Musk knew his statements here were false.

19       Similarly, the August 13, 2018 blog post authorized by Musk and published by Tesla  
20 purportedly giving an update on the proposed going private transaction omitted material  
21 information about it. It represented that discussions with the Saudi PIF were continuing and  
22 consensual whereas Musk had numerous arguments with its principal and just the day before had  
23 sought to cut them out from the deal entirely. Further, at the time of the blog post, the structure  
24 of the proposed transaction was still uncertain, the amount of funding needed was still unknown,  
25 and Musk was still assembling his team of legal and financial advisors. Discussions with investors  
26 had commenced, but support was lukewarm and still far from confirmed. These critical facts were  
27 omitted from the blog post which continued to present certainty that the transaction would  
28

1 proceed. Once again, Musk was in full possession of the contradictory and omitted facts but chose  
2 not to disclose them.

3 Finally, Plaintiff is entitled to summary judgment on the element of reliance. Plaintiff  
4 invokes the fraud-on-the-market doctrine to create a presumption of reliance by every class  
5 member on the public statements alleged to be misleading in this case. Under binding Supreme  
6 Court precedent, reliance is presumed on material public statements made regarding a security  
7 that trades in an efficient market. Tesla's securities are some of the most highly traded on the  
8 NASDAQ and Tesla is one of the most closely followed companies in the world. If there were  
9 any doubt regarding the efficiency of the market for its securities, Plaintiff's expert, Dr. Michael  
10 Hartzmark, conducted a detailed analysis of the trading in Tesla securities during the class period  
11 and concluded they traded in an efficient market. Defendants have offered no testimony or  
12 evidence, expert or otherwise, to the contrary. Accordingly, Plaintiff is entitled to summary  
13 judgment on this element of his claim.

14 From August 7, 2018 to August 17, 2018, Musk's tweets that he had a fully funded  
15 proposal to take Tesla private at \$420 per share with confirmed investor support roiled the market  
16 for Tesla stock and other securities. No part of this unconventional announcement was true: Musk  
17 had not secured funding to take Tesla private at \$420 per share nor confirmed investor support.  
18 Furthermore, Musk knew that, as of August 7, 2018 when he impulsively tweeted to over 22  
19 million followers, his going private proposal was little more than a preliminary, half-baked  
20 concept. When the truth about the haphazard and misleading nature of the statements was  
21 revealed, Tesla's investors lost billions of dollars. Based on the evidentiary record in this case, no  
22 reasonable juror could conclude that the August 7 and August 13, 2018 statements were **not**  
23 materially false and misleading, that Musk did **not** make those statements with scienter, and that  
24 class members did **not** rely on those statements. Partial summary judgment should be entered in  
25 Plaintiff's favor.



## **STATEMENT OF UNDISPUTED FACTS**

### **A. Tesla Background.**

In July 2018, Tesla was a NASDAQ-listed company with approximately \$50 billion in market capitalization.<sup>1</sup> Musk served as its Chairman and Chief Executive Officer.<sup>2</sup> Its Board of Directors consisted of Defendants Brad W. Buss, Robyn Denholm, Ira Ehrenpreis, Antonio J. Gracias, James Murdoch, Kimbal Musk, and Linda Johnson Rice.<sup>3</sup> On July 31, 2018, Tesla's stock price closed at \$298.14.<sup>4</sup>

### **B. July 31, 2018 Meeting with the Saudi Arabia Public Investment Fund.**

On July 31, 2018, Musk met with the Saudi PIF at the Tesla Fremont Factory.<sup>5</sup> Musk's Executive Assistant, Sam Teller, also attended the meeting and Tesla's Chief Financial Officer, Deepak Ahuja, attended for the last ten minutes; no one else from or on behalf of Tesla was present.<sup>6</sup> On behalf of the Saudi PIF, Yasir Al-Rumayyan, Saad Al Jarboa, and Naif Al-Mogren attended.<sup>7</sup> Al-Mogren took contemporaneous notes of the meeting.<sup>8</sup> The meeting lasted approximately 30 minutes. During the meeting, Al-Rumayyan expressed support for Tesla and said he "would like to listen more about [Musk's] plan to take it private."<sup>9</sup> As Al-Rumayyan described the meeting in subsequent texts sent to Musk on August 11 and 12: "We would like to explore investing in Tesla subject to being able to create a Tesla production hub in the Kingdom of Saudi Arabia . . . . Therefore, as discussed, we would like our teams to start working together in a confidential manner to explore a potential transaction" and "the agreement as was minuted by my people is to wait for the information to be sent be [sic] you within a week, on how we will

<sup>1</sup> M. Hartzmark Dep. at 34:8-36:15; *see also* Hartzmark Report (ECF No. 291-1) at ¶51 & Appendix C; Defendants' Answer to Consolidated Complaint for Securities Fraud ("Answer") (ECF No. 264) at ¶16.

<sup>2</sup> Answer at ¶17.

<sup>3</sup> *Id.* at ¶¶ 20-26.

<sup>4</sup> Hartzmark Report (ECF No. 291-1) at Appendix C.

<sup>5</sup> E. Musk Dep. at 89:19-24, 99:7-14; E. Musk SEC Tr. at 143:10-13.

<sup>6</sup> E. Musk Dep. at 99:4-6; Teller Dep. at 131:3-9, 163:13-17; Ahuja Dep. at 82:6-11.

<sup>7</sup> Teller Dep. at 132:2-17; E. Musk SEC Tr. at 110:8-10; Exhibit 80.

<sup>8</sup> Teller Dep. at 143:24-144:3, 148:21-24; Ahuja Dep. at 278:14-20.

<sup>9</sup> Teller Dep. at 134:18-23, 156:16-157:16; Exhibit 80.

1 move forward togetherI.”<sup>10</sup> At the close of the meeting, Al-Rumayyan asked Musk to share his  
 2 thoughts on the structure for the transaction, the percentage of ownership that would be needed  
 3 to complete the deal, and his “financial calculations to take it private.”<sup>11</sup> Although Musk did not  
 4 communicate it to the Saudi PIF, he had no intention of letting the Saudi PIF obtain majority  
 5 control of Tesla and wanted to limit its investment stake to 20 to 30 percent.<sup>12</sup>

6 Importantly, critical terms were not discussed with the Saudi PIF on July 31, 2018. The  
 7 price to be paid for Tesla stock in a going private transaction, later proposed by Musk as \$420 per  
 8 share, \$120 or 40% higher than its closing price on July 31, 2018, was never discussed.<sup>13</sup> The  
 9 percentage of any private Tesla that the Saudi PIF might own was not discussed, nor was the  
 10 overall structure of the transaction.<sup>14</sup> The total amount of funding, or even a range, was also not  
 11 discussed.<sup>15</sup> Indeed, as Ahuja testified, this could not be discussed until the structure of the  
 12 transaction was “refined further by Elon and his team.”<sup>16</sup> No legally binding document was  
 13 created as a result of the July 31, 2018 meeting with the Saudi PIF; Musk conceded he had no  
 14 legal recourse against the Saudi PIF if they refused to provide funding and that funding might not  
 15 be available at certain price levels.<sup>17</sup>

### 16 **C. “Offer to Take Tesla Private at \$420.”**

17 Musk never provided any further information to the Saudi PIF. On August 2, 2018,  
 18 however, Musk sent an email to Tesla’s Board with the subject line reading: “Offer to Take Tesla  
 19 Private at \$420.”<sup>18</sup> Musk did not provide any additional information or terms for the transaction,

20 \_\_\_\_\_  
 21 <sup>10</sup> Exhibit 121; Teller Dep. at 145:7-21; Ahuja Dep. at 97:7-98:1; E. Musk Dep. 225:11-230:23,  
 22 249:12-250:7; *see also* Exhibit 80 (notes indicating that Al-Rumayyan concluded the meeting by  
 23 saying, “I would like to listen to your plan Elon and what are the financial calculations to take it  
 24 private in the next week and if I did not receive anything, I will call you.”).

25 <sup>11</sup> Ahuja Dep. at 97:18-98:1; Teller Dep. at 145:7-21.

26 <sup>12</sup> E. Musk Dep. at 125:9-25.

27 <sup>13</sup> E. Musk Dep. at 109:23-110:1; E. Musk SEC Tr. at 231:22-232:10; Ahuja Dep. at 100:22-  
 28 101:14; Ahuja SEC Tr. at 93:20-24.

<sup>14</sup> E. Musk Dep. at 112:3-16; Ahuja SEC Tr. at 104:20-25.

<sup>15</sup> E. Musk Dep. at 110:22-24; E. Musk SEC Tr. at 136:9-13; Ahuja Dep. at 84:2-6; 102:14-16;  
 Ahuja SEC Tr. at 93:3-5; Teller Dep. at 164:20-24.

<sup>16</sup> Ahuja Dep. at 104:21-105:5.

<sup>17</sup> E. Musk Dep. at 132:24-133:13; 220:7-11; Ahuja Dep. at 108:22-110:8.

<sup>18</sup> E. Musk Dep. at 129:14-131:1; Exhibit 81.

1 such as the structure or source of funding.<sup>19</sup> There is no discussion of the price or how it was  
 2 determined in the body of the email; it is solely referred to in the subject line.<sup>20</sup> Musk also wrote  
 3 that the “offer expires in 30 days.”<sup>21</sup> Musk drafted this email by himself without any help, review,  
 4 or advice from counsel.<sup>22</sup> The “offer” price referenced in the subject line represented a 20%  
 5 premium to the then-market price, rounded up to \$420 “for karma.”<sup>23</sup> The premium was calculated  
 6 based on the market price for Tesla stock on August 2, 2018 which had risen substantially  
 7 following Tesla’s second quarter earnings call held on August 1, 2018.<sup>24</sup>

8 On August 2, 2018, after receiving Musk’s email, the Board convened a special telephonic  
 9 meeting (excluding Musk and his brother, Kimbal Musk).<sup>25</sup> During the meeting, Tesla’s General  
 10 Counsel, Todd Maron, told the Board that Musk did not intend to buy out all of Tesla’s  
 11 shareholders, “but instead to have a private structure with as many existing Tesla shareholders  
 12 remaining shareholders as possible, and with any shareholders who did not want to be part of a  
 13 private company being bought out.”<sup>26</sup> The Board asked Maron to schedule a further meeting at  
 14 which time Musk would “provide additional details regarding his proposal and explain to the  
 15 Board his thinking.”<sup>27</sup> Ahuja also provided some context for the proposal contained in Musk’s  
 16 email but testified that the transaction “was in the very, very early days.”<sup>28</sup> Given the absence of  
 17 material terms from Musk’s email, this was not a formal proposal for the Board to evaluate and  
 18 analyze.<sup>29</sup>

19 On August 3, 2018, Tesla’s Board convened a meeting with Musk to discuss his email.<sup>30</sup>  
 20 Musk did not provide any further details in terms of the funding or structure for the transaction,

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21 <sup>19</sup> Exhibit 81.

22 <sup>20</sup> *Id.*

23 <sup>21</sup> *Id.*

24 <sup>22</sup> E. Musk Dep. at 129:20-130:9.

25 <sup>23</sup> *Id.* at 131:25-132:5.

26 <sup>24</sup> *Id.* at 137:24-138:2; E. Musk SEC Tr. at 178:16-179:25.

27 <sup>25</sup> Exhibit 82.

28 <sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Ahuja Dep. at 131:17-132:5.

<sup>29</sup> E. Musk Dep. at 159:6-10, 213:8-12; *see also* Denholm Dep. at 44:25-45:16.

<sup>30</sup> Exhibit 83.

1 except that he wanted “current shareholders . . . to remain shareholders” after the transaction if  
 2 they desired while those that did not could be “bought out at an appropriate premium.”<sup>31</sup> With  
 3 regard to the premium, Musk reiterated his proposed price of \$420 per share which was “about a  
 4 20% premium over the current price of the stock, which had just undergone a recent run up after  
 5 the [Tesla’s] Q2 earnings call.”<sup>32</sup> The Board told Musk that “a detailed proposal regarding a going  
 6 private transaction had not yet been made and that one would be needed in order for the Board to  
 7 properly analyze and evaluate it.”<sup>33</sup> Finally, the Board authorized Musk “to have initial,  
 8 conceptual conversations with a few of the Company’s top shareholders to explore their interest  
 9 and gauge their reaction to a private corporate structure.”<sup>34</sup>

10 Musk did not have any communications with the Saudi PIF or any other Tesla investor  
 11 immediately following the August 3, 2018 Board meeting.<sup>35</sup> In fact, Musk had not even received  
 12 Tesla’s capitalization table showing its largest institutional and retail shareholders as of August  
 13 7, 2018.<sup>36</sup> Nor did he formally retain any advisors to assist him with the going private transaction  
 14 at any point between July 31, 2018 and August 7, 2018.<sup>37</sup> In fact, the only conversations he had  
 15 about the transaction during this time frame were short conversations with (i) Michael Dell of  
 16 Dell Technologies, (ii) Steve Rosenblum from Wachtell, Lipton, Rosen & Katz, and (iii) Egon  
 17 Durban from Silver Lake Partners. On August 4, 2018, Musk spoke with Dell briefly about his  
 18 experience on taking Dell private and obtained from Dell the names of his advisors when he took  
 19 Dell Technologies private.<sup>38</sup> Dell told Musk that he was “glad . . . to have taken Dell Computer  
 20 private” but that it was “a very difficult process” that took “something like a year” to complete.<sup>39</sup>

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21 <sup>31</sup> *Id.*

22 <sup>32</sup> *Id.* at 2.

23 <sup>33</sup> *Id.* at 3.

24 <sup>34</sup> *Id.* at 3; E. Musk Dep. at 159:20-160:2.

25 <sup>35</sup> Musk’s Amended and Supplemental Responses to Lead Plaintiff’s First Set of Interrogatories  
 dated September 10, 2021 (“Musk Interrogatory Responses”) at 27, 28, 30, and 35; E. Musk Dep.  
 at 165:15-17, 189:10-16; Ahuja Dep. at 172:8-173:1; Viecha Dep. at 159:6-161:17; *see also*  
 26 Exhibits 121, 151, 165.

27 <sup>36</sup> Exhibit 91; Ahuja Dep. at 224:10-224:19.

28 <sup>37</sup> E. Musk SEC Tr. at 165:1-5.

<sup>38</sup> E. Musk Dep. at 167:7-169:10.

<sup>39</sup> *Id.* at 167:14-168:14; E. Musk SEC Tr. at 161:6-21.

1 Dell suggested to Musk that he speak with his counsel, Rosenblum, which Musk did shortly  
2 afterwards, and Durban.<sup>40</sup>

3 During their conversation on August 6, 2018, Musk indicated to Durban his interest in  
4 taking Tesla private at a 20% premium and allowing current investors to remain investors after  
5 the transaction despite having to keep the number of shareholders below 300.<sup>41</sup> Musk also told  
6 Durban that he preferred to have a “broader investor base” in a private Tesla and wanted to limit  
7 the Saudi PIF to “something on the order of 15 percent, maybe up to 20 percent.”<sup>42</sup> Durban  
8 regarded Musk’s intended structure for the transaction as “unprecedented.”<sup>43</sup> With regard to  
9 funding, Durban’s notes of his conversation with Musk refer to “Saudis & UAE” but do not  
10 indicate that there was any commitment from the Saudi PIF to provide funding for Tesla going  
11 private.<sup>44</sup> Durban understood that there was no binding legal contract for any entity to provide  
12 funding to Musk to take Tesla private as of August 6, 2018, something Silver Lake requires before  
13 it describes funding as “secured.”<sup>45</sup>

14 **D. August 7, 2018 Statements.**

15 On August 7, 2018 at 9:48 a.m. PDT, Musk tweeted “Am considering taking Tesla private  
16 at \$420. Funding secured.”<sup>46</sup> Musk included the \$420 per share price to “make it clear that funding  
17 was secured at that level.”<sup>47</sup> At 10:40 a.m. PDST, Musk tweeted “I don’t have a controlling vote  
18 now & wouldn’t expect any shareholder to have one if we go private. I won’t be selling in either  
19 scenario.”<sup>48</sup> At 11:00 a.m. PDT, Musk tweeted “My hope is \*all\* current investors remain with  
20 Tesla even if we’re private. Would create special purpose fund enabling anyone to stay with Tesla.  
21 Already do this with Fidelity’s SpaceX investment.”<sup>49</sup> At 11:13 a.m. PDT, Musk tweeted  
22

23 <sup>40</sup> E. Musk Dep. at 169:11-23; E. Musk SEC Tr. at 162:7-11, 175:22-176:6.

24 <sup>41</sup> Durban SEC Tr. at 76:2-5, 81:15-18, 82:9-10, 86:25-88:10.

25 <sup>42</sup> E. Musk SEC Tr. at 170:2-11.

26 <sup>43</sup> Durban SEC Tr. at 89:14-89:24.

27 <sup>44</sup> Durban Dep. at 28:8-29:10; Exhibit 175.

28 <sup>45</sup> Durban Dep. at 43:6-11.

<sup>46</sup> Exhibit 8.

<sup>47</sup> E. Musk Dep. at 133:6-9.

<sup>48</sup> Exhibit 9.

<sup>49</sup> Exhibit 10.

1 “Shareholders could either to sell at 420 or hold shares & go private.”<sup>50</sup>

2 Shortly after Musk’s initial tweet at 9:48 a.m. PDT, Ahuja texted Musk: “Elon, am sure  
3 you have thought about a broader communication on your rationale and structure to employees  
4 and potential investors. Would it help if Sarah [Sarah O’Brien, head of Tesla Global  
5 Communications], Todd, and I draft a blog post or employee email for you?”<sup>51</sup> Ahuja had been  
6 surprised by Musk’s initial tweet as it was generally Tesla’s policy to keep significant transactions  
7 extremely confidential to a small group of people until the day of the transaction.<sup>52</sup> Musk accepted  
8 Ahuja’s offer and for the next few hours Ahuja, Maron, and O’Brien worked on a draft email for  
9 Musk.<sup>53</sup> After approving the draft, Musk sent it to Tesla’s employees and posted it on Tesla’s  
10 website.<sup>54</sup> The email reiterated, “First, I would like to structure this so that all shareholders have  
11 a choice. Either they can stay investors in a private Tesla or they can be bought out at \$420 per  
12 share, which is a 20% premium over the stock price following our Q2 earnings call (which had  
13 already increased by 16%).”<sup>55</sup> It stated further that, “Basically, I’m trying to accomplish an  
14 outcome where Tesla can operate at its best, free from as much distraction and short-term thinking  
15 as possible, and where there is as little change for all of our investors, including all of our  
16 employees, as possible.”<sup>56</sup> Musk explained that he meant current shareholders when he wrote  
17 “investors”.<sup>57</sup> The email did not mention funding or the Saudi PIF.<sup>58</sup>

18 At 12:36 p.m. PDT, Musk tweeted a link to his email to Tesla employees adding the  
19 statement: “Investor support is confirmed. Only reason why this is not certain is that it’s  
20 contingent on a shareholder vote.”<sup>59</sup> Musk later testified that at the time of this last tweet, his level  
21 of certainty that the transaction would be consummated was “probably roughly 50 percent.”<sup>60</sup>

22 <sup>50</sup> Exhibit 11.

23 <sup>51</sup> Exhibit 121 at 4.

24 <sup>52</sup> Ahuja Dep. at 58:15-59:6, 171:8-24.

25 <sup>53</sup> Exhibit 121 at 4; Ahuja Dep. at 182:19-185:21.

26 <sup>54</sup> Exhibit 301; E. Musk Dep. at 196:16-197:3, 208:5-7; Exhibit 12.

27 <sup>55</sup> Exhibit 12.

28 <sup>56</sup> *Id.*

<sup>57</sup> E. Musk Dep. at 210:15-25.

<sup>58</sup> *Id.* at 208:18-20.

<sup>59</sup> Exhibit 13.

<sup>60</sup> E. Musk SEC Tr. at 258:1-4.

**E. The Public's Response to Musk's Tweets.**

Analysts and investors immediately responded to Musk's tweets. For example, Itay Michaeli, an analyst at Citi Research, emailed Tesla's Director of Investor Relations, Martin Viecha, on August 7, 2018 to inquire whether there was "an actual transaction on the table (with secured financing)" or if going private was "more of a strategic announcement" to which Viecha responded that "the very first Tweet mentioned a firm offer."<sup>61</sup> Nii Owuraka Koney, a Managing Director at Jennison Associates, a significant Tesla investor, emailed Viecha on August 7, 2018 requesting a telephone call to discuss the "funding" for the transaction. Viecha responded that "[t]he very first tweet simply mentioned 'Funding secured' which means that this is a firm offer" and that "the offer is as firm as it gets."<sup>62</sup> According to Koney, his "view all along" was that the "offer at \$420" was a "real offer."<sup>63</sup> Bradley Erickson, an analyst at KeyBanc Capital Markets, emailed Viecha on August 7, 2018 asking for him to "clarify" whether "financing is secured." Viecha responded by confirming that "the first Tweet clearly stated that 'financing is secured.' Yes, there is a firm offer."<sup>64</sup> And, Toni Sacconaghi, an analyst at AllianceBernstein, emailed Viecha on August 7, 2018 for "questions/clarifications on today's news and blog post." Viecha stated in response that "apart from what has been tweeted and what was written in a blog post, we can't add anything else. I only wanted to stress that Elon's first tweet, which mentioned 'financing secured' is correct" and that "financing is secured regardless of other assumptions."<sup>65</sup>

Most analysts following Tesla interpreted Musk's tweets as indicating a going private transaction was likely. JP Morgan's analyst, Ryan Brinkman, wrote on August 8, 2018:

As surprising to us as these developments are, and as lacking as the statements are in any details regarding who is expected to provide the required amount of financing and on what terms, they are nevertheless declarative statements from the CEO of a public company which we feel should be considered seriously. Either funding is secured or it is not secured, and Tesla's CEO says funding is secured. Therefore, we are incorporating into our valuation the

<sup>61</sup> Exhibit 146; *see also* Viecha Dep. at 129:8-129:18.

<sup>62</sup> Exhibit 58; *see also* Viecha Dep. at 137:13-138:21.

<sup>63</sup> Koney Dep. at 116:8-116:15.

<sup>64</sup> Exhibit 150; *see also* Viecha Dep. at 154:13-155:11.

<sup>65</sup> Exhibit 151 at 1-2; *see also* Viecha Dep. at 156:21-158:15.



real possibility the equity will be taken out at \$420 per share.<sup>66</sup>

On August 9, 2018, Teller began emailing Tesla's largest investors, including Tencent, Primecap, Jennison Associates, Capital World, Allianz, Fidelity, Baillie Gifford, and T. Rowe Price, to get their "thoughts and feedback" on the going private transaction.<sup>67</sup> Some investors responded that they would not be able to support the transaction because of restrictions or mandates against owning shares in private companies.<sup>68</sup> [REDACTED]

Ultimately, according to Musk, "roughly half of the investors were supportive of – or they – they would continue to remain investors as [sic] Tesla – with Tesla as a private company, but most preferred that we would remain public."<sup>72</sup>

#### **F. Musk's Attempts to Secure Funding and Confirm Investor Support.**

Musk met with Durban on August 10, 2018.<sup>73</sup> Silver Lake Partners had created a presentation to show "the process and sort of diligence that you would need to do to raise the capital."<sup>74</sup> Silver Lake Partner's "Illustrative Public-to-Private Process Timeline" lists as the first item "Submit formal proposal to board following arrangement of committed financing" given that committed financing for the transaction had not yet been arranged.<sup>75</sup> At this time, according to

<sup>66</sup> Brinkman Dep. at 72:18-75:10; Exhibit 15.

<sup>67</sup> Exhibits 113-120; Exhibit 147.

<sup>68</sup> Viecha Dep. at 149:25-150:20.

<sup>69</sup> Exhibit 90.

<sup>70</sup> Fath Dep. at 48:13-49:7, 53:24-54:13; *see also* Exhibits 44-47.

<sup>71</sup> Koney Dep. at 113:13-114:5.

<sup>72</sup> E. Musk Dep. at 297:5-23; *see also* Viecha Dep. at 171:21-178:3, 189:19-190:22, 191:12-193:14, 194:4-201:10; Exhibits 79, 155, 157, 158 (discussing investor feedback).

<sup>73</sup> Durban SEC Tr. at 126:18-22.

<sup>74</sup> *Id.* at 127:10-17.

<sup>75</sup> Durban Dep. at 48:21-56:23; Exhibit 179 at 29.



1 Durban, the proposed Tesla going private transaction had not even reached this first stage.<sup>76</sup> In  
 2 fact, on August 10, 2018, the same day as the Silver Lake Partners' presentation, Al-Rumayyan  
 3 on behalf of the Saudi PIF sent Musk a text message stating, "We would like to explore investing  
 4 in Tesla subject to being able to create a Tesla production hub in the Kingdom of Saudi Arabia  
 5 that serves MENA, Europe, Asia and Africa, with the right incentives on all fronts (subsidies on  
 6 energy and land, tax exemptions, support in obtaining financing, etc.). Therefore, as discussed,  
 7 we would like our teams to start working together in a confidential manner to explore a potential  
 8 transaction."<sup>77</sup>

9 On August 12, 2018, Al-Rumayyan followed up with Musk about the transaction, texting  
 10 him: "Let's see the numbers and get our people to meet and discuss. We cannot approve  
 11 something that we don't have sufficient information on. We've agreed that you will send the  
 12 financial information and the way going forward within a week and no thing [sic] happened  
 13 since."<sup>78</sup> Musk conceded at his deposition that he had agreed to provide this information on July  
 14 31, 2018 and the Saudi PIF needed to have this information before it could commit funding.<sup>79</sup>  
 15 Musk never provided the Saudi PIF with the deliverables he agreed to at the end of the July 31,  
 16 2018 meeting. Instead, disappointed with the Saudi PIF's public statements regarding the  
 17 transaction, Musk told Al-Rumayyan that he was no longer interested in taking Tesla private with  
 18 the Saudi PIF, saying "I'm sorry, but we cannot work together," "Sorry. It's over," and "[p]lease  
 19 extend an offer to the Crown Prince that I would like to apologize personally and explain why  
 20 Tesla will not [sic] with PIF in this transaction."<sup>80</sup>

21 On August 13, 2018, Musk posted an "Update on Taking Tesla Private" on Tesla's  
 22 website.<sup>81</sup> In this update, Musk stated that the Saudi PIF "has expressed support for proceeding  
 23 subject to financial and other due diligence and their internal review process for obtaining  
 24

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25 <sup>76</sup> Durban Dep. at 57:10-20.

26 <sup>77</sup> E. Musk Dep. 225:11-230:23; Exhibit 121 at 8.

27 <sup>78</sup> E. Musk Dep. 244:1-248:15; Exhibit 121 at 11-2.

28 <sup>79</sup> E. Musk Dep. at 247:5-248:15.

<sup>80</sup> *Id.* at 244:1-245:1; Exhibit 121.

<sup>81</sup> Exhibit 16.

1 approvals. He has also asked for additional details on how the company would be taken private,  
 2 including any required percentages and any regulatory requirements.”<sup>82</sup> Musk then stated “I  
 3 continue to have discussions with the Saudi fund, and I also am having discussions with a number  
 4 of other investors, which is something that I always planned to do since I would like for Tesla to  
 5 continue to have a broad investor base.”<sup>83</sup> With respect to the next steps, Musk wrote: “If and  
 6 when a final proposal is presented, an appropriate evaluation process will be undertaken by a  
 7 special committee of Tesla’s board . . . . If the board process results in an approved plan, any  
 8 required regulatory approvals will need to be obtained and the plan will be presented to Tesla  
 9 shareholders for a vote.”<sup>84</sup> The blog post did not indicate that Musk had sought to terminate  
 10 discussions with the Saudi PIF just one day earlier. In fact, in response to the blog post, Al-  
 11 Rumayyan texted Musk: “Elon, I am personally surprised. You have signed an NDA while we  
 12 are waiting for you and your team to provide us with information to move forward, you post an  
 13 ill-advised blog with loose information.”<sup>85</sup>

14 **G. Musk Announces the Withdrawal of the Going-Private Transaction.**

15 As of August 16, 2018, Musk still had not secured funding or investor support for the  
 16 transaction. Silver Lake Partners, on Musk’s behalf, was in the process of obtaining “formal  
 17 permission to make the following calls to respond / engage potential interested / existing  
 18 investors: Saudi Arabia, UAE, ten cent [sic], google, Ron Barron, Silver Lake affiliates (gic,  
 19 Temasek, cpp, ADIA and Kia).”<sup>86</sup> The email then said “No solicitation will be made other than  
 20 testing their interest to participate in the Tesla going private initiative led by Elon.”<sup>87</sup>

21 On August 16, 2018, the *New York Times* published a lengthy interview with Musk.<sup>88</sup> The  
 22 article described the events of August 7, 2018, including his tweets as well as facts such as the  
 23 August 7, 2018 tweets were not approved in advance by Tesla’s Board and that “funding, it turned

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24 <sup>82</sup> *Id.* at 2.

25 <sup>83</sup> *Id.* at 2.

26 <sup>84</sup> *Id.* at 2.

27 <sup>85</sup> E. Musk Dep. at 257:9-258:20; Exhibit 121 at 13.

28 <sup>86</sup> Durban Dep. at 134:1-135:18; Exhibit 194.

<sup>87</sup> Durban Dep. at 135:20-136:3; Exhibit 194

<sup>88</sup> Exhibit 19.

1 out, [was] far from secure.”<sup>89</sup> This article led analyst Brinkman of JP Morgan to discount entirely  
 2 the possibility of a going private transaction for Tesla and conclude that the August 7, 2018 tweets  
 3 were not true.<sup>90</sup>

4 On August 23, 2018, the Board held an in-person meeting.<sup>91</sup> Silver Lake Partners and  
 5 Goldman Sachs attended and discussed the availability of funding for a going private  
 6 transaction.<sup>92</sup> Their discussion materials demonstrate that neither the price per share nor the  
 7 amount of capital required had been determined; each was indicated by “[\*]”.<sup>93</sup> At the meeting,  
 8 Silver Lake Partners and Goldman Sachs outlined a process to obtain the necessary funding for  
 9 the going private transaction.<sup>94</sup> Musk also discussed with the Board “information he had learned  
 10 in recent weeks following his announcement, including but not limited to, the negative views of  
 11 many of the Company’s current stockholders regarding the prospect of the Company going  
 12 private, the difficulties the Company’s current stockholders would have in continuing to own  
 13 Tesla’s stock if the Company went private . . . .”<sup>95</sup> Musk then informed the Board “that he was  
 14 withdrawing his offer to try and take [Tesla] private.”<sup>96</sup>

### 15 **LEGAL STANDARD**

16 Summary judgment is proper where there is “no genuine dispute as to any material fact  
 17 and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). A factual dispute  
 18 is material only when it “might affect the outcome of the suit under the governing law,” and is  
 19 genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving  
 20 party based upon it.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A court’s role  
 21 in deciding a motion for summary judgment is not to evaluate the evidence and decide the truth  
 22 of the matter, rather “to determine whether there is a genuine issue for trial.” *Id.* at 249. There is  
 23

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24 <sup>89</sup> *Id.* at 4.

25 <sup>90</sup> Brinkman Dep. at 100:9-106:15; Exhibit 23 at 1-2.

26 <sup>91</sup> Exhibit 101.

27 <sup>92</sup> *Id.* at 2.

28 <sup>93</sup> Durban Dep. at 149:12-22; Exhibit 201 at 9, 58.

<sup>94</sup> Exhibit 101 at 2-3.

<sup>95</sup> *Id.* at 1.

<sup>96</sup> *Id.* at 4.

no issue for trial unless there is sufficient evidence supporting a jury verdict for the nonmoving party, meaning that the evidence must be more than merely colorable but probative and persuasive. *Id.* at 249-250. A defendant cannot defeat summary judgment by “the mere denial of subjective knowledge of the risk that a statement could be misleading. Summary judgment requires a statement that is materially misleading such that no reasonable jury could conclude otherwise.” *S.E.C. v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1094 (9th Cir. 2010). “When the defendant is aware of the facts that made the statement misleading, ‘he cannot ignore the facts and plead ignorance of the risk.’” *Id.* at 1094 (internal quotations omitted). When analyzed under this rubric, the discovery record leads undeniably to one conclusion: that Musk acted with scienter when making the false and materially misleading tweets on August 7, 2018 and blog post on August 13, 2018.

### **ARGUMENT**

#### **A. Plaintiff Is Entitled to Summary Judgment as to the Elements of Falsity and Scienter.**

##### 1. “Am considering taking Tesla private at \$420. Funding secured.”

Discovery has confirmed what the Court plausibly inferred when denying Defendants’ motion to dismiss, *i.e.*, Musk’s tweet “could be read by a reasonable investor to mean complete funding for the transaction was unconditionally secured.” *In re Tesla, Inc. Securities Litig.*, 477 F. Supp. 3d at 922. This is precisely what happened. Indeed, as Durban testified, Silver Lake uses the term “secured” to reference binding legal contracts committing capital.<sup>97</sup> Tesla’s Director of Investor Relations echoed this understanding, telling analysts that “the first Tweet clearly stated that ‘financing is secured.’ Yes, there is a firm offer”<sup>98</sup>; “the offer is as firm as it gets”<sup>99</sup>; and that “financing is secured regardless of other assumptions.”<sup>100</sup> Brinkman, JP Morgan’s analyst, concluded that “Either funding is secured or it is not secured, and Tesla’s CEO says funding is secured.”<sup>101</sup> This was not true.

<sup>97</sup> Durban Dep. at 42:12 – 43:2.

<sup>98</sup> Exhibit 150; *see also* Viecha Dep. at 154:13-155:11.

<sup>99</sup> Exhibit 58; *see also* Viecha Dep. at 137:13-138:21.

<sup>100</sup> Exhibit 151 at 1-2; *see also* Viecha Dep. at 156:21-158:15.

<sup>101</sup> Exhibit 15 at 1.

1 No offer for funding had been discussed, extended, or accepted as of August 7, 2018, the  
 2 date of the tweet, or at any point thereafter. Musk had only a preliminary conversation with the  
 3 Saudi PIF on July 31, 2018. This meeting is notable for what did not occur: price was not  
 4 discussed, structure was not discussed, percentage of ownership by the Saudi PIF was not  
 5 discussed, and regulatory approvals were not discussed.<sup>102</sup> Musk did not even intend to use the  
 6 Saudi PIF to fund all or even a majority of any going private transaction.<sup>103</sup> Yet this was the only  
 7 potential source of funding that Musk had spoken to before tweeting out that funding was  
 8 “secured”. Musk knew this. He was present at the July 31, 2018 meeting with the Saudi PIF,  
 9 knew that nothing had been agreed, knew his own intentions about limiting their involvement,  
 10 and, therefore, knew that his tweet was false.

11 A statement is misleading if it creates an “impression of a state of affairs that differs in a  
 12 material way from the one that actually exists.” *Berson v. Applied Signal Tech., Inc.*, 527 F.3d  
 13 982, 985 (9th Cir. 2008) (internal quotations omitted). As demonstrated, Musk created the  
 14 impression that funding had been “secured” to take Tesla private when, in reality, there was no  
 15 agreement to fund the transaction at any price let alone \$420 per share. Musk, of course, knew  
 16 this when he tweeted on August 7, 2018 because he was the one conversing with the Saudi PIF  
 17 on July 31, 2018. Thus, the evidentiary record indisputably establishes both falsity and scienter  
 18 in favor of Plaintiff’s claims against Musk. *See Platforms Wireless*, 617 F.3d at 1095 (granting  
 19 summary judgment where defendants’ statement left investors with the “unmistakable  
 20 impression” that product “exist[ed]”); *see also Livid Holdings Ltd. v. Salomon Smith Barney,*  
 21 *Inc.*, 416 F.3d 940, 948 (9th Cir. 2005) (holding that numerous contingencies to “fund-raising  
 22 effort” directly contradicted statement that \$25 million offering had been “completed”).

23 The Ninth Circuit’s holding in *Platforms Wireless*, *supra*, is instructive. There, the  
 24 defendants issued a press release that left investors with the impression that they had actually  
 25 developed a viable ARC system, when in fact at the time, Platforms had only a design of the

27 <sup>102</sup> Exhibit 80; *see also* Teller Dep. at 134:19-23, 156:16-157:16; E. Musk Dep. at 109:23-110:1;  
 Ahuja Dep. at 100:22-101:10; Ahuja SEC Tr. at 93:20-94:4; Viecha Dep. at 135:10-135:19.

28 <sup>103</sup> E. Musk Dep. at 125:9-25.

1 system and no operational prototype. 617 F.3d at 1094-95. In affirming the grant of summary  
 2 judgment to plaintiff on the Section 10(b) and Rule 10b-5 claims based on this press release, the  
 3 court held that considering the press release as a whole, the press release was “deceptive, an  
 4 absolute and unequivocal falsehood” in that it left the “unmistakable impression that the ARC  
 5 System exists.” *Id.* at 1095. Similarly, Musk’s “funding secured” tweet is an explicit and  
 6 unambiguous representation that Musk had secured funding for a going-private transaction at  
 7 \$420 per share when, in fact, he had had only a preliminary and cursory discussion with the  
 8 Saudi PIF that did not mention any purchase price let alone one at \$420 per share. “Funding  
 9 secured” created the unmistakable impression that funding for a going-private transaction at  
 10 \$420 was in place; it does not reflect Musk’s mere nascent discussions of funding in an uncertain  
 11 and unknowable amount for a going private transaction at some unknown price using an  
 12 uncertain structure. The numerous analyst reports and inquiries in response to the tweet, *e.g.*, JP  
 13 Morgan, Jennison Associates, bolster this conclusion. *See No. 84 Emp’r-Teamster Joint Council*  
 14 *Pension Tr. Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 936 (9th Cir. 2003) (relying on analyst  
 15 statements when determining cause of stock price movement); *see also United States v.*  
 16 *Ferguson*, 676 F.3d 260, 274 n.10 (2d Cir. 2011) (placing “substantial” weight on “stock  
 17 analysts” when evaluating statement).

18 Musk has stated that his tweets were true because he was confident funding could be  
 19 obtained. This is unavailing. A defendant cannot defeat a fraud claim merely by asserting that he  
 20 believed the statements were true. “If such a self-serving assertion could be views as controlling,  
 21 there would never be a successful prosecution or claim for fraud.” *Id.* at 1095. With no price per  
 22 share discussed with the Saudi PIF at the July 31, 2018 meeting and Musk’s basis for selecting  
 23 the \$420 per-share offer not occurring until days later following Tesla’s quarterly earnings  
 24 report, the undisputed facts demonstrate that funding was not secured at \$420 per share as he  
 25 represented in his tweet. Musk’s testimony clearly demonstrates that he was aware of this.<sup>104</sup>  
 26 Accordingly, while Musk may presently claim “that the [Saudi PIF] was ready, willing, and able

27 <sup>104</sup> E. Musk SEC Tr. at 231:22-232:10 (“No, there was no – there was nothing with explicitly a  
 28 420 deal price document.”)

1 to fund the transaction at a standard, reasonable price premium,” this does not translate into  
 2 “Funding secured.”<sup>105</sup> Given that Musk knew the lack of any binding commitment to provide  
 3 “secured funding” by the Saudi PIF for a going-private transaction at \$420, there can be no  
 4 genuine issue of material fact that Musk acted with scienter when he tweeted that funding was  
 5 secured. *See id.* (finding defendant acted with scienter when he had knowledge that the statement  
 6 at issue was false and still authorized its release).

7 The events and conversations transpiring after the July 31, 2018 meeting with the Saudi  
 8 PIF underscore Plaintiff’s point on this issue. On August 10, 2018, three days after the tweet,  
 9 Silver Lake Partners told Musk that arranging “committed financing” was the first step in the  
 10 going private transaction process, meaning that it had yet to be done.<sup>106</sup> Meanwhile, that same  
 11 day, Al-Rumayyan on behalf of the Saudi PIF sent Musk a text expressing interest in “explor[ing]  
 12 a potential transaction,” demonstrating the preliminary posture of their discussions.<sup>107</sup> On August  
 13 12, 2018, two days later, Al-Rumayyan texted Musk to once again ask for his financial  
 14 calculations on the transaction, saying “Let’s see the numbers and get our people to meet and  
 15 discuss. We cannot approve something that we don’t have sufficient information on.”<sup>108</sup> Nothing  
 16 had been approved by the Saudi PIF as of August 12, 2018 and, therefore, nothing could have  
 17 possibly been approved by the Saudi PIF almost a week earlier on August 7, 2018. If the Saudi  
 18 PIF did not have enough information on August 12 and had not approved any funding as of that  
 19 time, there can be no dispute that it had not agreed to provide funding on August 7.

20 Weeks later Musk and his bankers were still trying to obtain funding for the transaction.  
 21 On August 23, 2018, Goldman Sachs and Silver Lake Partners discussed with the Board  
 22 financing sources for a going private transaction “including the time and resources that process  
 23 would take,” indicating that financing had not yet been secured and that securing it would take  
 24 time.<sup>109</sup> Additionally, the discussion materials provided by Goldman Sachs and Silver Lake

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25 <sup>105</sup> Musk Interrogatory Responses at 25.

26 <sup>106</sup> Exhibit 179 at 29.

27 <sup>107</sup> Exhibit 121 at 8.

28 <sup>108</sup> *Id.* at 11.

<sup>109</sup> Exhibit 101 at 2.



Partners indicated that the total amount of capital necessary was still to be determined.<sup>110</sup> If funding had been secured at \$420 per share, this price would have been utilized by the bankers and the amount of capital committed to the going-private would have reflected that and there would have been no need to launch a campaign to raise funds for a transaction.

2. “Investor support is confirmed.”

Contrary to Musk’s tweet, discovery shows that “investor support” had not been “confirmed.” In fact, Musk had not spoken with any of Tesla’s outside investors regarding a potential going private transaction at \$420 per share; that price had only been mentioned to Tesla’s Board.<sup>111</sup> Under no circumstances could investor support have been “confirmed” when Musk had not even communicated the possibility of a going private transaction to any outside investors, aside from the brief conversation with the Saudi PIF. There was a stark difference between what Musk represented publicly and what actually existed at the time, thereby demonstrating that the tweet was “deceptive, an absolute and unequivocal falsehood.” *See Platforms Wireless*, 617 F.3d at 1094-95; *see also S.E.C v. Sourlis*, 851 F.3d 139 (2d Cir. 2016) (affirming judgment for violating Section 10(b) and Rule 10b-5 where defendant represented she spoke with certain “note-holders” in connection with proposed transaction when, in fact, she indisputably did not).

Any effort by Musk to avoid summary judgment on this issue should be rejected. Even support from the Saudi PIF had not yet been confirmed. There had been no discussion at the July 31, 2018 meeting about price per share, structure, or percentage of ownership.<sup>112</sup> In light of the fact that Musk did not discuss percentage of ownership at the meeting, he had no way of knowing whether the Saudi PIF would even still be interested in investing in Tesla if capped at, for example, 20%, as Musk intended.<sup>113</sup> Further, this representation of “investor support” is

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<sup>110</sup> Exhibit 201 at 9.

<sup>111</sup> E. Musk Dep. at 218:19-219:2; Musk Interrogatory Responses at 25, 26, 27, 30, and 35.

<sup>112</sup> Exhibit 80; *see also* Teller Dep. at 134:19-23, 156:16-157:16; E. Musk Dep. at 109:23-110:1, 112:3-16; Ahuja Dep. at 100:22-101:10; Ahuja SEC Tr. at 93:20-94:04; Viecha Dep. at 135:10-135:19.

<sup>113</sup> E. Musk SEC Tr. at 116:20-22.



1 unsupported by (and, in fact, contrary to) what occurred in the days that followed. On August 9,  
 2 2018, two days after the tweet, Teller sent emails to Tesla's largest shareholders, including  
 3 Tencent, Primecap, Jennison Associates, Capital World, Allianz, Fidelity, Baillie Gifford, and  
 4 T. Rowe Price.<sup>114</sup> The emails stated that "Elon would like to speak with you about the Tesla go-  
 5 private transaction to get your thoughts and feedback."<sup>115</sup> If support had been confirmed, Musk  
 6 would not need "thoughts and feedback" from these investors. As Musk later discovered, these  
 7 investors did *not* support the transaction.<sup>116</sup> Likewise, the Saudi PIF had not confirmed support  
 8 for the transaction at this point, given the fact that it was only "explor[ing] a potential  
 9 transaction" with Musk as of August 10, 2018 and still asking for his financial calculations in  
 10 support of the transaction as of August 12, 2018; indeed, Al-Rumayyan explicitly told Musk in  
 11 his text message dated August 12, 2018, that "[the Saudi PIF] cannot approve something that we  
 12 don't have sufficient information on."<sup>117</sup>

13 3. "Only reason why this is not certain is that it's contingent on a shareholder vote."

14 Not only was investor support not confirmed, but there were also numerous contingencies  
 15 to the transaction before even getting to a shareholder vote. The Board had nothing in the way of  
 16 a formal offer to review at this point, making it impossible to consider or negotiate a final  
 17 agreement that could be presented for a shareholder vote.<sup>118</sup> As of August 7, 2018 when Musk  
 18 made this tweet, he had not even given Tesla's Board the formal "detailed proposal" that they  
 19 needed and requested days earlier "to properly analyze and evaluate" the transaction.<sup>119</sup>  
 20 Additionally, as Musk admitted under oath, his level of certainty that the transaction would be  
 21 consummated at the point in time that he tweeted this statement was "*probably roughly 50*  
 22 *percent.*"<sup>120</sup> As discussed by Silver Lake Partners in their meeting with Musk on August 10, 2018,

23  
 24 <sup>114</sup> Exhibits 113-120.

25 <sup>115</sup> Exhibits 113-120.

26 <sup>116</sup> Exhibit 101 at 1; E. Musk Dep. at 292:15-293:9.

27 <sup>117</sup> Exhibit 121 at 8, 11.

28 <sup>118</sup> E. Musk Dep. at 159:6-10, 213:8-12; Ahuja Dep. at 127:17-128:13; Denholm Dep. at 44:25-45:16.

<sup>119</sup> Exhibit 83 at 3.

<sup>120</sup> E. Musk SEC Tr. at 258:1-4 (emphasis added).

the following steps still needed to be completed before a shareholder vote could even take place: (1) submit a formal proposal to board following arrangement of committed financing; (2) negotiate with independent directors; (3) sign a merger agreement and announce deal; (4) hire proxy advisors and engage communications teams; (5) file regulatory and other approvals; and (6) draft, file, and clear a proxy statement.<sup>121</sup> Musk recognized that a special committee would need to be created to evaluate the transaction too.<sup>122</sup> He also knew that regulatory approval would be required.<sup>123</sup> Thus, a shareholder vote was not the “only reasons why this is not certain,” and Musk knew that at the time of his tweet.

4. “I have continued to communicate with the Managing Director of the Saudi fund. He has expressed support for proceeding subject to financial and other due diligence and their internal review process for obtaining approvals. He has also asked for additional details on how the company would be taken private, including any required percentages and any regulatory requirements.”

On August 13, 2018, Musk used a blog post on Tesla’s website to purportedly “answer some of the questions” that had been asked in response to his tweets from the previous week.<sup>124</sup> The blog post was titled “Update on Taking Tesla Private” and discussed *inter alia* why he wanted to take Tesla private, why he said “funding secured,” and what his next steps would be. In pertinent part, Musk described the history of his communications with the Saudi PIF. While Musk wrote about his conversations with the Saudi PIF at length, he did not disclose that over the previous weekend he had sought to end all negotiations with the Saudi PIF.<sup>125</sup>

Rule 10b-5(b) prohibits the making of “any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” 17 C.F.R §240.10b-5(b). Musk was under no obligation to provide the public with an update on his conversations with the Saudi PIF.

<sup>121</sup> Exhibit 179 at 29.

<sup>122</sup> Exhibit 16 at 2.

<sup>123</sup> *Id.* at 2.

<sup>124</sup> *See generally id.*

<sup>125</sup> Exhibit 121.

1 However, once Musk chose to do so, he was “bound to do so in a manner that wouldn’t mislead  
 2 investors as to what [those conversations] consisted of.” *Berson*, 527 F.3d at 987. The temporal  
 3 proximity between Musk’s conversation with Al-Rumayyan and his blog post to investors  
 4 underscores the scienter with which he acted when making this statement. *See In re Apple Sec.*  
 5 *Litig.*, No. 19-cv-02033-YGR, 2020 U.S. Dist. LEXIS 206298, at \*29 (N.D. Cal. Nov. 4, 2020)  
 6 (“the law is clear that close temporal proximity between an allegedly fraudulent statement or  
 7 omission and a later disclosure may bolster an inference of scienter”).

8 **B. Plaintiff Is Entitled to Summary Judgment as to the Element of Reliance.**

9 Where, as here, Plaintiff relies on the fraud-on-the-market doctrine, reliance by every class  
 10 member is presumed where: “(1) the alleged misrepresentations were publicly known, (2) they  
 11 were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock  
 12 between when the misrepresentations were made and when the truth was revealed.” *Halliburton*  
 13 *Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 268 (2014) (“*Halliburton II*”). Indeed, the Supreme  
 14 Court has repeatedly held that “courts may presume that investors trading in efficient markets  
 15 indirectly rely on public, material misrepresentations through their ‘reliance on the integrity of  
 16 the price set by the market.’” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 462  
 17 (2013); *see also Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 812 (2011)  
 18 (“*Halliburton I*”); *Basic Inc. v. Levinson*, 485 U.S. 224, 249-50 (1988). The discovery record at  
 19 hand shows without question that each of the above factors is met.

20 First, there is no dispute that Musk’s false and misleading statements were publicly known  
 21 as they were made on the public platform, Twitter, by Musk who had over 22 million followers  
 22 at the time. Second, the statements at issue were material.<sup>126</sup> Tesla’s stock price reaction to the  
 23 tweets was instantaneous and the market quickly reacted to further developments during the class  
 24 period.<sup>127</sup> Third, Plaintiff’s expert, Dr. Michael Hartzmark, opined that the market for Tesla’s  
 25 securities traded in an open, developed, and efficient market during the class period.<sup>128</sup> This

26  
 27 <sup>126</sup> Hartzmark Report (ECF No. 291-1) at ¶¶71-76.

28 <sup>127</sup> *Id.* at ¶74.

<sup>128</sup> *Id.* at ¶¶1, 92, 155, 179.

opinion is supported by detailed analysis of trading in Tesla securities utilizing the factors widely accepted by federal courts across the country.<sup>129</sup> This evidence “affords . . . [P]laintiff[] a presumption of reliance,” and to defeat summary judgment, Defendants have “the burden of producing evidence to rebut the presumption” such that “no rational jury could find for [Plaintiff] on this issue.” *Kaplan v. Rose*, 49 F.3d 1363, 1376 (9th Cir. 1994), *overruled on other grounds by City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605 (9th Cir. 2017). But Defendants have made no effort to challenge the finding of market efficiency. At class certification, Defendants did not contest any of Dr. Hartzmark’s findings or Plaintiff’s contention that Tesla’s securities traded in an efficient market.<sup>130</sup> While Defendants have introduced three expert reports since then, none opines on the issue of market efficiency or the applicability of the *Basic* presumption. Finally, there is no dispute that Plaintiff and the Class traded Tesla securities between when the misrepresentations were made and when the truth was revealed.

As Plaintiff has “put forth un rebutted evidence that [Tesla] securities traded on an efficient market,” summary judgment is warranted “on the issue of class-wide reliance.” *In re Celestica Inc. Sec. Litig.*, No. 07 Civ. 0312 (GBD), 2014 U.S. Dist. LEXIS 116562, at \*39-40 n.15 (S.D.N.Y. Aug. 20, 2014); *see also McCrary v. Elations Co. LLC*, No. EDCV 13-0242 JGB (SPx), 2014 U.S. Dist. LEXIS 190468, at \*10 (C.D. Cal. Dec. 8, 2014) (where “‘under the governing law, there can be but one reasonable conclusion as to the [issue],’” summary judgment is appropriate); *In re Infineon Techs. AG Sec. Litig.*, 266 F.R.D. 386, 389 (N.D. Cal. 2009) (“where a rational trier of fact could not find for the nonmoving party based on the record as a whole, there is no ‘genuine issue for trial’”).

### **CONCLUSION**

The discovery in this case is one-sided on the issues of falsity, scienter, and reliance. Defendants cannot point to anything in the record capable of creating a “genuine dispute as to any material fact.” FED. R. CIV. P. 56(a). Plaintiff’s motion should be granted in its entirety.

<sup>129</sup> *Id.* at ¶¶22-92, 93-155.

<sup>130</sup> *See* Stipulation and Order for Class Certification dated November 25, 2020 (ECF No. 298).

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Respectfully submitted,

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